

General Information Letter: Transportation dispatcher does not have nexus with Illinois because of activities of independent contractors who do the actual transportation.

November 4, 2002

Dear:

Your letter has recently been forwarded to our office for reply. In your July 15, 2002 letter you state the following:

We are trying to determine the taxability of a contract carrier Incorporated in The State of New Jersey. They dispatch trucking loads to independent contractors from their offices in NJ. The contractors then pickup and deliver these loads which may:

1. originate in your state,
2. terminate in your state,
3. travel through your state originating and terminating in another state.

We are trying to determine if the company is subject to Corporate Income Taxes in your state for their fiscal year ending April 30, 2002.

For the Fiscal Year from May 1, 2001 through April 30, 2002 their sales in your state were \$113,210.00 with total annual sales for all states being \$3,243,582.00. The miles logged in your state by the independent truckers were 1,609 versus total miles for all states of 692,789 for the period. They do not maintain offices, employ workers or physically enter your state other than the independents.

Please notify us in writing as to the taxability of these business activities in your state. If this letter has reached the incorrect department please forward it to the correct office within your state.

According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2 Ill.Adm.Code §1200, or on the website <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

The question of nexus is highly fact-dependent. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and circumstances.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

Section 201 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/101 et seq, imposes a tax measured by net income on corporations for the privilege of earning or receiving income in this State. The Due Process and Commerce Clauses of the Federal Constitution limit the power of States to subject foreign corporations to tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)). Similarly, the Commerce Clause requires that the tax be applied to an activity with a substantial nexus with the taxing state. Id.

Unless protected by Public Law 86-272, a foreign corporation has the requisite nexus to subject it to Illinois income tax where any part of its income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act (35 ILCS 5/301-304, 308). Public Law 86-272 is a federal statute that prohibits a state's taxation of interstate sales of tangible personal property. Public Law 86-272 states in part:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either or both of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Illinois construes the protection of Public Law 86-272 very narrowly. Almost any activity exceeding the parameters of that statute will cause that protection to be forfeited. An out-of-state corporation can lose the immunity provided by Public Law 86-272 where its activities within the state exceed the mere solicitation standard of that law. A corporations' activities in Illinois beyond solicitation that are more than *de minimus* will establish nexus with Illinois. Once nexus is established, all business income attributable to its Illinois activities to be apportioned to this State under IITA Section 304. Illinois uses a single-sales factor approach defined in IITA Section 304(a)(3)(A). The fraction consists of "the numerator of which is the total sales of the person in this State during the taxable year, and the denominator of which is the total sales of the person everywhere during the taxable year." Any income that is apportioned to Illinois will be subject to taxation under Section 201.

Enclosed please find a copy of 86 Ill.Adm.Code Section 100.9720. This is the Illinois Department of Revenue regulation discussing nexus. Please refer to subsections (c)(4) entitled "Unprotected Activities", (c)(5) entitled "Protected Activities" and (c)(6) entitled "Independent Contractors."

Your question deals with the taxability of a contract carrier incorporated in New Jersey who hires independent trucking contractors to pickup and deliver truckloads of tangible personal property into, out of and through Illinois. Your letter indicates that the contract carrier at issue does not maintain any offices in Illinois, does not employ Illinois workers and does not have any employees physically located in Illinois or traveling through Illinois. The contract carrier's only connection to Illinois seems to be from activities performed by independent contractors who pickup and deliver tangible personal property, or just pass through Illinois as they make their deliveries in other states for said contract carrier. Based on the facts as you have provided them in your letter, the contract carrier at issue in your letter would be protected by Public Law 86-272 from Illinois income tax.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department.

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Sincerely,

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